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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1983

THE KANSAS CITY SOUTHERN RAILWAY COMPANY, a corporation,

Petitioner,

VS.

ELDON FAULKENBERRY,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State of Oklahoma

BRIEF OF RESPONDENT ELDON FAULKENBERRY IN OPPOSITION TO PETITION FOR CERTIORARI

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August, 1983

QUESTION PRESENTED FOR REVIEW

Liepelt, infra, requires in all FELA cases a jury must be instructed, when requested, that any award the jury might make to the plaintiff is not subject to income taxes.

Ten days prior to *Liepelt,* an Oklahoma state trial court, relying on a previous decision of the Supreme Court of Oklahoma, refused to give such an instruction, although requested to do so by petitioner.

On appeal from judgment rendered on the jury verdict, the Supreme Court of Oklahoma, relying upon *Gulf Offshore,* infra, held that *Liepelt* was probably retroactive in application, and it was error on the part of the trial court to refuse the instruction, but, in the light of the facts and circumstances of the particular case, the error was not prejudicial.

The question presented for review is whether the Supreme Court of Oklahoma was within its prerogative when that court made its finding of no demonstrated prejudice in the trial court's refusal to give the requested instruction.

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OPINION BELOW

The opinion of the Supreme Court of Oklahoma is reproduced as Appendix "A" to the petition and is reported at Okl, 661 P.2d 510 (1983).

JURISDICTION

The petition does not cite the correct jurisdictional statute. The petition cites 28 USC §1254(1) as invoking this court's jurisdiction. The applicable jurisdictional statute is 28 USC §1257(3), which covers writs of certiorari from the highest courts of a state. This statute, coupled with the fact

this is a Federal Employers' Liability Act (45 USC §§51, et seq.) case, gives this court jurisdiction to entertain the petition.

STATUTES INVOLVED

This is an FELA case, 45 USC §§51, et seq.

STATEMENT OF CASE

The facts necessary for a determination of the question presented are set forth in the opinion of the Supreme Court of Oklahoma found at Appendix "A" of the petition. Petitioner's factual allegation found at page 2 of the petition, to the effect that its motion for new trial alleged petitioner was entitled to a new trial because of the trial court's refusal to give the proffered instruction, is an untrue statement of fact. Petitioner did not timely allege the error in the trial court in its motion for new trial. See footnote 6 of the opinion of the Supreme Court of Oklahoma at Appendix "A" of the petition. The Supreme Court of Oklahoma, examined the question herein involved *sua sponte*.

SUMMARY OF ARGUMENT

1. Under Gulf Offshore, infra, once the Supreme Court of Oklahoma made the determination that **Liepelt** was to be applied as retroactive to pre-**Liepelt** trials, then that court was required to go the next step and determine if the error was prejudicial.
2. It did so and found no prejudice.
3. That finding settled the question.

ARGUMENT

The Oklahoma trial court instructed the jury in this case on February 8, 1980. On that date, had the trial judge given the requested instruction, the trial judge would have committed error under Oklahoma law. See *Chicago, Rock Island, & Pacific Rwy. Co. v. Kinsey,* Okla. 372 P.2d 863 (1962).

Ten days later on February 19, 1980, this court rendered its opinion in *Norfolk & Western Rwy Co. v. Liepelt,* 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed. 2d 689 (1980). The second prong of *Liepelt*[1] requires in FELA cases the jury be instructed any award the jury might make the plaintiff is not subject to income taxes.

Until *Gulf Offshore Co. v. Mobil Oil Corp.,* 453 U.S. 473, 101 S.Ct. 2870, 69 L.Ed. 2d 784 (1981), decided by this court July 1, 1981, what appeared as a plausible argument could be made that *Liepelt* was to be prospective and not retroactive. For instance, please see *Ingle v. Illinois Central Gulf R. Co.,* 608 S.W.2d 76, (Mo. App. 1980), *cert. denied,* 450 U.S. 916, 101 S.Ct. 1359, 67 L.Ed. 2d 341 (1981); *Dunn v. St. Louis-San Francisco Rwy. Co.,* 621 S.W.2d 245 (Mo. banc 1981), *cert. denied,* 454 U.S. 1145, 102 S.Ct. 1007, 71 L.Ed. 2d 298 (1982).

Gulf Offshore at footnote 16 put to rest, for all practical purposes, the question of the prospective or retroactive effect of *Liepelt,* notwithstanding the rationale of *Ingle.*

The Supreme Court of Oklahoma in the opinion under review on the basis of *Gulf Offshore,* held *Liepelt* retroac-

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[1]The first point of **Liepelt** is not involved herein.

tive and, further, that it was error for the trial judge not to have given the requested instruction.

Under *Gulf Offshore,* however, that did not end the matter. Once the Supreme Court of Oklahoma had determined it was error not to have given the instruction, then the court was required to go to the next step and determine if the failure to give the instruction was *prejudicial* error. This step was necessary because, in remanding *Gulf Offshore* back to the Texas court, the Supreme Court of the United States with specific reference to the question of the instruction in a pre-*Liepelt* trial, issued its directive in the following language from the last sentence of *Gulf Offshore.* That sentence reads:

> "If the court decides that it was error to refuse the instruction, it may then address respondent's argument that the petitioner was not prejudiced by the error."

This is precisely what the Supreme Court of Oklahoma did in the opinion under review.[2] The court found the failure to give the instruction on the part of the trial court not prejudicial to the petitioner and affirmed the judgment.

For an identical situation involving FELA, a pre-*Liepelt* trial, *Liepelt,* and harmless error, please see *Flanigan v. Burlington Northern, Inc.,* 632 F.2d 880 (CA 8 1980), *cert. denied,* 450 U.S. 921, 101 S.Ct. 1370, 67 L.Ed. 2d 349 (1981).

The opinion of the Supreme Court of Oklahoma sets out ample facts to support the finding by that court of no

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[2]The nine member court was unanimous in its opinion as to the **Liepelt** point and two other points involved in the appeal. The court divided on a point not herein involved.

prejudice to the petitioner resulting from the trial court's failure to give the instruction.

It is fair to say the petition under consideration simply does not address the issue involved. Further, with all due respect, the authority cited in the petition is somewhat perplexing. The case of *Ybarra v. Burlington Northern, Inc.*, 689 F.2d 147 (CA 8 1982), at page 7, is a post-*Liepelt* case in which the *Liepelt* instruction was given. Under the same point, the petition refers to what would appear to be, perhaps, a decision from the Court of Appeals for the Tenth Circuit, but the petition does not disclose either the style of the case or a citation where it may be found in the reports.

CONCLUSION

There being nothing shown that would warrant review by this court the petition for certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert S. Blatt, a member of the Bar of this Court, and counsel of record for Eldon Faulkenberry, the respondent herein, hereby certify that:

(1) All parties required to be served in this proceeding have been served;

(2) Three (3) copies of the foregoing brief of respondent Eldon Faulkenberry, in opposition to petition for certiorari were served on counsel of record for petitioner in this proceeding at his post office address, as follows: Mr. Richard L. Keirsey, Esq., of Looney, Nichols, Johnson & Hayes, P.O. Box 468, Oklahoma City, Oklahoma 73101;

(3) Service on such party was made on the 12th day of August, 1983, by depositing said copies of this brief of respondent Eldon Faulkenberry in opposition to petition for certiorari, in a United States Post Office, First Class postage, fully prepaid, and addressed to the above named counsel.

/s/ Robert S. Blatt